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IN THE

Supreme Court of the United States

October Terms, 1955

No. 596 23

CLINTON E. JENCKS,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition of Clinton E. Jencks for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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UNITED STATES OF AMERICA.

Petition of Clinton E. Jencks for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Clinton E. Jencks respectfully petitions that a writ of certiorari issue to review two judgments of the United States Court of Appeals for the Fifth Circuit. In one judgment the Court of Appeals [R. 1220][1] affirmed the judgment of conviction of the United States District Court for the Western District of Texas, El. Paso Division. In the other the Court of Appeals [H. 855][1] af-

[1]Each proceeding had its own record below. References to the trial record will be in the form R. ....., and to the motion for new trial record thus, H. ..... The trial record bears the Court of Appeals' No. 15157; that of the motion for a new trial No. 15557.

firmed the order of the same District Court denying petitioner's motion for new trial based on the ground of newly discovered evidence.

Opinions Below.

The opinions of the Court of Appeals are not yet reported. They are set out in the Transcripts of Record prepared in that Court. [R. 1192; H. 836.]

Jurisdiction.

The judgments of the Court of Appeals were made and entered October 26, 1955. Petitioner timely filed his petitions for rehearing on November 15, 1955. [R. 1221; H. 856.] The Court of Appeals made and entered its orders denying the same on December 1, 1955. [R. 1239; H. 871.] The jurisdiction of this Court is invoked under 28 U. S. C., section 1254(1).

Questions Presented.

1. Whether on the cross-examination of a key government witness, who had been employed by the F.B.I. as an informer, the trial court on application should require to be produced to it the witness' contemporaneous reports to the F.B.I. concerning the transactions covered in his direct testimony and make available to the accused so much of those reports as are relevant for impeachment of the witness.

2. Whether, when a witness described as above fully recants his trial testimony and testifies on a motion for new trial and his recantation is attacked on cross-examination as a recent fabrication corruptly induced, the trial court should on application require to be produced to it the same reports and make available to the accused so

much of those reports as are relevant to the truth of the recantation and the rehabilitation of the witness.

3. Whether under the circumstances described in question two the trial court should on application require to be produced to it a statement dictated by the witness to an F.B.I. agent before the trial to the effect that he did not believe his grand jury testimony herein to be honest and make available to the defendant so much of that statement as is relevant to the rehabilitation of the witness.

4. Whether the trial court's instruction on the issue of membership,

(a) failed to provide the jury with any legal yardstick against which to appraise the evidence;

(b) permitted the jury to make a finding of membership in the Communist Party as of April 28, 1950, solely upon evidence of membership long in advance of that date, contrary to the decision of this Court in *American Communications Assn. v. Douds*, 339 U. S. 382, and failed to advise the jury of limitations upon criminal liability under the statute involved;

(c) applied the statute in such a way that it afforded no ascertainable standard of guilt and abridged First Amendment liberties.

5. Whether the trial court's instructions on the issue of affiliation,

(a) defined affiliation in a manner contrary to that decided by this Court in *Bridges v. Wixon*, 326 U. S. 135;

(b) provided the jury with a wholly confusing and misleading charge and failed to furnish it a useable legal yardstick in that the instruction both equated membership and affiliation and differentiated the two;

(c) applied the statute in such a way that it afforded no ascertainable standard of guilt and abridged First Amendment liberties.

6. Whether in a prosecution for false statement under 18 U. S. C., section 1001 and 29 U. S. C., section 159(h) evidence of a prior affidavit to the same effect, but not alleged in the indictment, is admissible, and if so, whether it is error to fail to instruct the jury as to the probative effect of such evidence.

7. Whether the trial court at the request of the accused should instruct the jury that the testimony of witnesses who had been employed by the F.B.I. as informers posing as members of the Communist Party, and in that capacity had participated in the transactions with the accused covered in their testimony, should be approached with caution and weighed with great care.

8. Whether under 28 U. S. C., section 1861, subdivision 4, it is permissible systematically to exclude women from the jury system for the reason that they are declared incompetent by state law.

Statutes Involved.

The pertinent provisions of the statutes involved: 29 U. S. C., section 159(h); 18 U. S. C., section 1001; 28 U. S. C., section 1861; Texas Civil Statutes, Articles 2133, 2134; and the constitutional provisions involved: First, Fifth and Sixth Amendments, Article I, section 9, clause 3, of the Constitution of the United States are set forth in the Appendix.

Statement of the Case.

Petitioner was charged and found guilty in two counts of filing with the National Labor Relations Board a false affidavit of non-Communist union officer contrary to 18 U. S. C., section 1001 and 29 U. S. C., section 159(h). He was sentenced to a term of five years imprisonment on each count, the sentences to run concurrently.

The indictment [R. 1] was filed April 20, 1953. It alleged that on April 28, 1950, the defendant made and filed the affidavit and that he knew it contained a false denial of membership in the Communist Party (count one) and a false denial of affiliation with that Party (count two). The affidavit [G-1, R. 978-979] was purportedly executed and filed in connection with an effort by Local 890, International Union of Mine, Mill & Smelter Workers[2] to comply with the requirements of 29 U. S. C., section 159(h).

Motions Challenging Selection of the Grand and Petit Juries.

By appropriate motions [R. 3-11, 45-51] petitioner asserted the invalidity of the grand jury which returned the indictment and the trial jury which returned the verdict. In each instance the grounds were the systematic and intentional exclusion of women from the jury system. The supporting affidavits of E. B. Elfers, Esq. [R. 9, 10, 49-51] and the testimony of the jury commissioner[3] are that only the names of men have been placed in the box,

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[2]The International Union is herein called Mine-Mill.

[3]To save expense in the appeal brought to the court below, petitioner did not cause that testimony to be transcribed. No issue was raised in the court below with this statement as to the effect of the testimony. If any issue is raised to this Court, petitioner will ask leave to supplement the record with a full transcript of it.

that the names of women have been purposely excluded solely because of their sex, and this is deemed required under the applicable provisions of federal and state law. (28 U. S. C. A., Sec. 1861; Texas Civil Stat., Art. 2133.) There is no issue of fact in these respects.

Evidence Dealing With the Issues of Membership in and Affiliation With the Communist Party.

(a) THE PRE-AFFIDAVIT PERIOD, APRIL, 1946 TO AUGUST, 1949.

Seven witnesses testified to events occurring in this period, of whom five described "closed Communist Party meetings." The witness Currie testified to such a meeting, composed of veterans, at the home of the Colorado state chairman of the Party. This was in April, 1946, four years before the affidavit. Jencks said that veterans faced many problems which could be met only if Communist Party members raised them before the membership of veterans' organizations and that they should participate in all such groups. [R. 210-219.]

The witness Ford, who was an informer employed by the F.B.I. to pose as a Party member, testified to five such "closed" meetings ranging over a twelve-month period ending nine months before the affidavit was signed. The first was called by a local officer of the Communist Party and was part of the 1946 election campaign of the Progressive Party. Jencks was a candidate of that party for Congress and he said he would do all in his power to further the election campaign. [R. 257-259.]. The second was called by the same officer and resulted in the selection of delegates to attend a meeting of a Mexican-American Association. The third was called by the same officer to

complete the organization of the Communist Party in New Mexico. Jencks was placed on the State Board and given responsibility for labor. [R. 263-266.] The fourth was a meeting of the State Board attended by petitioner who reported on his work among labor, including recruiting. [R. 267-269.] The last meeting was called by the same officer in preparation for a meeting of the Mexican-American Association. He asked those present to support the meeting but remain in the background. [R. 269-270.] During the period "starting in 1949 and up to September in 1950," while Ford was a security officer of the Party, Jencks was not "replaced in his position on the State Board" [R. 300], and no disciplinary action was taken against him in his presence. [R. 267, 277, 282.]

The witness Knott testified to such a "closed" meeting in late 1946, some three and one-half years before the affidavit. Present were three representatives of Mine-Mill, including Jencks and the witness, and the Communist Party organizer for the area. The discussion covered internal union matters such as getting out a monthly publication to the membership and consolidating the several local unions into one, as well as developing a "solid Communist Party group" and payment of dues to the Communist Party. [R. 412-418.]

Peterson testified to two such meetings. They were composed exclusively of union personnel, including Peterson, said to be also members of the Communist Party. The first was held approximately two and one-half years before the affidavit and at the time of a Mine-Mill conference. Discussed were problems of disaffection and the conflict of "left" and "right" within the union as well as opposition to the then pending Taft-Hartley bill. [R. 494-499.] The second of these meetings was held nearly

two years before the oath. The discussion covered secession movements in the Union, the Wallace campaign for the Progressive Party and the Union's position not to file non-communist affidavits. [R. 507-510.] Peterson said he attended a Rocky Mountain Convention of the Communist Party with Jencks, more than two years before the affidavit. He and Jencks were put on a committee to combat discrimination against Mexican-American people, and they heard a speech decrying governmental encroachments on civil liberties and asking Party members to resist them. [R. 500-506.]

The witness Eckert was a former officer of Mine-Mill. He said he attended two "closed" Communist meetings with Jencks which discussed the candidacies of two union members for union office. [R. 905-914.] These meetings were held over two and one-half years before the affidavit was signed.

One Brooks testified to a front porch conversation in May, 1947, nearly three years before the affidavit. When Brooks commented that Jencks' remarks sounded like "Communist beliefs," petitioner is said to have retorted that "he was a Communist and proud of it." [R. 386-388.] Finally, the printer for the local union newspaper identified an editorial, published in October, 1949, and signed by Jencks [G. 24, R. 970-974] containing this sentence, "Now that our Union has signed the phony affidavits we can defend ourselves on a ballot in case of raids." [R. 973.]

(b) The Post-Affidavit Period.

Terrazas testified that during the years 1950, 1951 and 1952, petitioner had urged the union membership to buy the Daily People's World because it brought truth

to the people. [R. 932.] According to Matusow this was a "West Coast Communist Party newspaper." [R. 593.]

Matusow testified to four incidents involving petitioner. These occurred in late July and early August 1950, approximately three months after the affidavit, at a vacation ranch in New Mexico. In three of them Matusow attributed to petitioner admissions of membership in the Communist Party and participation in its affairs. In one of these Matusow said that Jencks described preparations by representatives of Mine-Mill to cut off copper production for the Korean hostilities. In the fourth incident he testified that petitioner urged the reading of the Daily People's World, favored a disarmament plan of the Soviet Union and expressed opposition to the Korean fighting, terming the United States an aggressor. [R. 588-589, 590-592, 592-596, 597-598.]

Evidence Tending to Prove a Separate Crime Not Charged.

In addition to the 1950 affidavit the government offered an affidavit dated October 15, 1949 [G. 7, R. 92, 989], along with other documents purportedly connected with a 1949 "filing" by Local 890. [G. 8, G. 9, G. 10; R. 989-995.] The offers were objected to on the ground that they tended to prove a different offense, since barred by the statute of limitations, and were highly prejudicial. [R. 114.] They were finally received subject to this objection. [R. 976.]

The Trial Court's Instructions.

On the issue of membership the District Judge charged the jury that they "may consider" not only attendance at Communist Party meetings and holding office therein, but also "conduct consistent only with membership in the

Communist Party and all other evidence, either direct or circumstantial, which bears or may bear upon the question of whether or not he was a member . . .". [R. 1061.] The court refused petitioner's requested charges to the effect that the act of joining the Party is the crucial element of the proof of membership and that membership is a consensual relation requiring proof of acceptance of the conditions therefor laid down by the Party. [R. 1120-1121.]

The District Court's charge on the issue of affiliation included a dictionary definition of the verb "affiliate" which embraced the concept of association or connection and the attachment of membership. Additionally it said that affiliation "means something less than membership but more than sympathy." It permitted the jury to find affiliation from "all the evidence." [R. 1063.] The court refused petitioner's request to charge that affiliation imported a status of mutual recognition and dependability upon which the individual and the organization may rely and that affiliation required more than a showing of cooperation or repeated acts of support. [R. 1122-1123.]

On the credibility of hired informers, the District Judge charged the jury that it "may consider" the circumstances of their receipt of "money for services and expenses in furnishing information to the Federal Bureau of Investigation." [R. 1064.] It rejected petitioner's proffered charge that the testimony of such persons should be approached "with caution" and weighed "with great care." [R. 1117-1118.]

The trial court gave no instruction at all on the probative use, if any, of the 1949 affidavit.

Denial of Access to Informer Reports to F.B.I. Made by the Witnesses Matusow and Ford Contemporaneously With the Events and Transactions Covered in Their Testimony.

At the time of the incidents covered in his direct testimony, Matusow purported to be a member of the Communist Party while he was in fact an informer employed by the F.B.I. His instructions were to report at least once a week and to include everything relating to Party activities without selection or omission. [R. 651-653, 657-658.]

Petitioner moved that the trial judge require the government to produce these reports to the court for its determination as to the portions relevant for impeachment, only the latter to be provided petitioner. [R. 658-659.] The motion was denied. [R. 667.]

At the time of the occurrences related in his testimony, Ford also was employed by the F.B.I. as an informer. His recollection was that he "reported on every meeting" [R. 347], and as soon thereafter as he could, "while things were still fresh in [his] memory." [R. 309-310.] Petitioner moved the trial court for production and inspection of Ford's reports on the same grounds and under the same conditions urged in connection with the Matusow reports. [R. 897-898.] This was denied. [R. 898.]

The court below characterized petitioner's motions as requests to be "permitted to explore the government's file with the hope of turning up inconsistent statements by government witnesses Ford and Matusow." [R. 1217.]

The Motion for New Trial Based on the Ground of Newly Discovered Evidence.

While petitioner's appeal to the court below was pending he duly and timely filed, on January 28, 1955, with the trial court, his motion for new trial based on the ground of newly discovered evidence. Petitioner's motion [H. 2-6] was supported by an affidavit of Harvey Matusow, the government's principal witness at the trial, dated January 20, 1955 [H. 7-12], which recanted his trial testimony. After a hearing in which evidence was taken, the motion was denied on March 12, 1955 [H. 825-826], apparently for the reason that the trial judge disbelieved the recantation. [H. 819, 820.]

The Evidence Taken at the Hearing on the Motion for New Trial.

Matusow testified at length at the hearing and recanted fully and in detail his testimony given at the trial. The hearing was given over largely to the government's massive attack upon Matusow's credibility. Its thesis was that he had told the truth upon the trial and had lied in recanting as a result of corrupt inducement moving from petitioner and his union. The government's claim rests largely on the following:

1. Before testifying at the trial Matusow had on four occasions testified to substantially the same facts as those given by him at the trial.

2. In a transcription of Matusow's tape recording, prepared in connection with the writing of his book[4] [H. 689-692, 696-697] and an excerpt from a preliminary

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[4]"False Witness", by Harvey Matusow, Cameron and Kahn, publishers, New York, 1955.

draft of the book [H. 681, 684], Matusow said as late as December, 1954, and January, 1955, that he knew Jencks was a Communist.

3. Following Matusow's admissions to Bishop Oxnam and Messrs. Brown and Norvell that he had given false testimony,[5] he on at least four occasions endorsed his original testimony or denied that he had ever lied.

4. Matusow was impecunious before being contacted by those who ultimately published his book. He was given money and thereafter wrote his book and made his recantation. [H. 284-287, 291, 294, 300, 317, 321-326, 322, 327, 730-737, 546-547.]

Denial of Access to F.B.I. Reports by Matusow at the Hearing on the Motion for New Trial.

On his redirect examination, and after the foregoing attack upon his credibility, Matusow testified that none of his contemporaneous reports to the F.B.I. made concern-

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[5]After these men had made public Matusow's admissions of having "borne false testimony and desires to publish a book on the 'World of McCarthy'" for which he needed a publisher's advance of $1500, petitioner's counsel decided to get a publisher to assist Matusow. (See Judge Dimock in *United States v. Flynn* (D. C., N. Y.), 130 Fed. Supp. 412, 416.) Contact with a publishing house in New York was made and money paid it for expenses by way of advance purchase of copies of the book if one eventuated. Matusow undertook to write the book for an advance against royalties of $1500. He was contacted by the publishers at Taos, New Mexico, while engaged on a bicycle trip from Dallas. At the time he was low in funds. Mine-Mill paid the publisher a total of $3250 ($2000 of this after completion of the manuscript) by way of advance purchases. It made plans for extensive distribution of the book, for it sought vindication of itself as well as petitioner against the Matusow charges of plotting to cut off copper production for Korea. Matusow knew nothing of the Mine-Mill financial arrangements until after he had given his affidavit of recantation. [H. 631-638, 774-792, 788-789, 802, 803, 809-811, 233-234, 330, 378-400, 453.]

ing his observations at the vacation ranch in July and August, 1950, indicated that he "had any conversations that established that Jencks was a Communist." [H. 662.] He said they would show that he "had no way of knowing who were or were not Communists, including Mr. Jencks" and that he "never at any time identified Mr. Jencks as a member of the Communist Party in the reports [he] turned in to the F.B.I. in that period when [he] was reporting." [H. 661.] Petitioner asked that the government be required to produce these reports to the court for its examination to determine their relevance to the issue of fabrication in the recantation, only the relevant portions to be inspected by petitioner. [H. 663.] The request was denied. [H. 664.]

Early in his cross-examination Matusow testified that in late August, 1953 (intermediate his testimony to the Grand Jury and his testimony at the trial of petitioner) he had spoken to an agent of the F.B.I. at Santa Fe, New Mexico, stating that he did not want to testify in the Jencks trial, that "I didn't feel my testimony was honest . . . I didn't want ever to testify and especially in the Jencks trial that was coming up." The agent wrote down what Matusow said and showed it to Matusow for his approval. [H. 67-69.] The court was requested to order that the F.B.I. reports embodying what Matusow said be produced to the court for its inspection to determine its relevance on the issue of the truth of Matusow's testimony at the hearing, the relevant portions to be made available to petitioner. The request was denied. [H. 107, 147.]

Reasons for Granting the Writ.

Presented are questions important to the administration of justice in the application of section 9(h). While this Court has approved the non-Communist affidavit requirement on its face (*American Communications Assn. v. Douds*, 339 U. S. 382), it has yet to review a case showing the practical operation of the statute. Frankly aimed at the elimination of trade union officers identified only by association and ideology, the statute as applied here has been given an ambit of limitless scope wherein membership has no outer limits and affiliation embraces cooperation for constitutionally protected objects. The resulting problems of First and Fifth Amendment vagueness portend a political censorship pervading the entire leadership of the trade union movement.

A necessary concomitant of this vagueness was the failure of the trial court to provide the jury with workable legal yardsticks for appraising the evidence. The issues of membership and affiliation were left at large; their determination at the hands of the jury rested upon the latter's personal notions or predilections, not upon their evaluation of fact guided by legal principles. The conviction does not rest upon a verdict arrived at through a judicial process as we know it.

Also presented is the availability of tested methods of ascertaining truth in respect of the testimony of informers in the pay of the Department of Justice. The evidence of such persons was key to this conviction. But neither when the witness testified at the trial and petitioner asserted he lied, nor later when he recanted and the government claimed he lied, was petitioner able to gain access to his contemporaneous informer reports respecting the

transactions covered in his trial testimony. The shadow of perjury by an inherently untrustworthy witness (an informer for pay) has never been dissipated or given substance by resort to the best evidence of the facts in question.

The Court of Appeals in affirming the denial by the District Court at the trial, of petitioner's access to such portions of Matusow's contemporaneous F.B.I. reports as that court had determined, in camera, to be relevant for purposes of impeachment, has rendered a decision in conflict with the decisions of the Court of Appeals for the Second Circuit on the same matter. *United States v. Krulewitch* (C. A. 2), 145 F. 2d 76; *United States v. Cohen* (C. A. 2), 145 F. 2d 82. See also *United States v. Beekman* (C. A. 2), 155 F. 2d 580; *United States v. Andolschek* (C. A. 2), 142 F. 2d 503. The decision of the court below also misapplied the decision of this Court in *Gordon v. United States,* 344 U. S. 414.

The affirmance of the District Court's denial, at the hearing, of petitioner's access to those portions of the same reports as that court had similarly determined to be relevant to the issues there, determined the admissibility and evidentiary value of the reports in a way in conflict with the applicable decisions of this Court and the Court of Appeals for the Second Circuit. *Ellicott v. Pearl,* 35 U. S. (10 Pet.) 412, 439; *Gelbin v. N. Y., N. H. & H. R. R. Co.* (C. A. 2), 62 F. 2d 500; *Di Carlo v. United States* (C. A. 2), 6 F. 2d 364.

In both respects mentioned above the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the District Court, as to call for an exercise of

this Court's power of supervision. The reports in question were the best evidence of the matters recorded in them (3 Wigmore, *Evidence,* 3d ed., p. 76, Sec. 738), and they would have had high evidential value in the event they either expressly negatived the trial testimony or failed to mention the incidents related in that testimony. (Wigmore, *op. cit.,* p. 733, Sec. 1042.)

The Court of Appeals in approving the instructions of the District Court on the issue of membership has, upon the evidence in this record, applied the statute (29 U. S. C. A., Sec. 159(h)) in a way in conflict with the decision of this Court in *American Communications Assn. v. Douds,* 339 U. S. 382, and has applied the presumption of continuance in a way in conflict with the decision of this Court in *Maggio v. Zietz,* 333 U. S. 56. Additionally, the approval of that instruction so far sanctioned a departure from the accepted and usual course of judicial proceedings by the District Court as to call for an exercise of this Court's power of supervision for the reason that the instruction equipped the jury with no legal criterion for its appraisal of the evidence and has rendered the statute so vague, indefinite and uncertain as to afford no ascertainable standard of guilt and to trespass upon First Amendment liberties.

The decision of the Court of Appeals in approving the instructions of the District Court on the issue of affiliation has decided a federal question in conflict with the decision of this Court in *Bridges v. Wixon,* 326 U. S. 135, and has so far sanctioned a departure from the accepted and usual course of judicial proceedings by the District Court as to call for an exercise of this Court's power of supervision for the reason that the instruction

gave the jury no legal criterion for its appraisal of the evidence and has rendered the statute so vague, indefinite and uncertain as to afford no ascertainable standard of guilt and to abridge First Amendment liberties.

The holding of the Court of Appeals sustaining the ruling of the District Court in receiving evidence of a prior but separate offense not charged and in failing to instruct the jury as to the limited probative effect of that evidence so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure, as to call for an exercise of this Court's power of supervision in that the jury was confused by the evidence and petitioner was convicted of a charge not made.

The decision of the Court of Appeals affirming the refusal of the trial court to give petitioner's requested charge on the credibility of hired informers is in conflict with the decisions of the Court of Appeals for the District of Columbia on the same subject. *United States v. Fletcher* (C. A. D. C.), 158 F. 2d 321, 322; *Cratty v. United States* (C. A. D. C.), 163 F. 2d 844, 850. It presents a question of growing importance to the integrity of the judicial process because of the practice of using informers in criminal prosecutions involving political association and belief.

The Court of Appeals in affirming the judgment of the District Court has necessarily but not explicitly decided an important question of federal law which has not been, but should be, settled by this Court in that the District Court approved the jury selection system of that District which systematically and deliberately excluded women solely on account of their sex.

ARGUMENT.

POINT ONE.

The Court Below Erred in Affirming the Ruling of the Trial Court, Which Denied Petitioner's Request for an Order Requiring the Government to Produce the F.B.I. Reports to the Court for Its Determination as to Relevance and Making Available to Petitioner Such Reports as Were Relevant.

(a) Petitioner's Request, at the Trial, With Reference to Matusow's Reports to the F.B.I. Which He Was Employed to Make Contemporaneously With the Transactions Covered in His Direct Testimony.

The facts summarized *ante*, page 11, indicate ample basis in this record for the conclusion that such reports were in existence and would have reflected these transactions had they occurred. Petitioner sought at the trial no blunderbuss foray into F.B.I. files. His motion was so framed [R. 658-659] that it would have obtained only those portions of the described reports which (a) pertained to the incidents related in the direct, and (b) contradicted the direct.

This Court has observed that where "the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny." *Gordon v. United States*, 344 U. S. 414, 417. That policy applies with especial force to the case at hand. Even the prosecutor admitted that Matusow's testimony was "absolutely essential." [H. 13.]. The government's burden was to convince the jury that petitioner had knowingly falsified his denial of connection[6] with the Communist Party

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[6]We use this term as a shorthand for "membership in and affiliation with."

as of April 28, 1950. Only Matusow's testimony speaks of the period after that date.[7] All the rest speaks of a period nine months to four years before that date. The court below found the evidence sufficient only upon "the Government's total proof."

Given these circumstances all information that would assist a discriminating appraisal of Matusow's trustworthiness was an undeniable prerequisite to the fairness of the trial. The trial court's action resulted in withholding facts that might have had inestimable value in impeaching this already suspect witness.[8] The Court of Appeals in the Second Circuit holds that under these circumstances the government must produce the reports. Where it is not possible for the accused to show the contradiction before the document is produced, it must be produced to the court for it to determine whether it is relevant for impeachment purposes. If it is so relevant the accused must be allowed to inspect it. *United States v. Krulewitch* (C. A. 2), 145 F. 2d 76, 79; *United States v. Cohen*

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[7]His credibility had been sharply attacked at the trial. On two prior occasions of testimony concerning Jencks, Matusow had failed to mention three of the four incidents related at the trial. [R. 657-658, 678-679.] A quondam hired informer and renegade Communist, he had turned his revelations into money as an expert on anti-Communism and campaigner for Senator McCarthy. [R. 681-689.] His repeated lies about his residence had been used to obtain improper voting privileges [R. 623-629] or jurisdiction for a divorce action [R. 637-638] or to obtain travel money he was not entitled to. [R. 642-643.]

[8]As contemporaneous records of the matters they recite, prepared under directions and in accordance with a practice to be all-inclusive, the reports were the best evidence of those matters—superior to the unaided recollection of the witness given three and one-half years later. 3 Wigmore, *Evidence*, 3d ed., p. 76, Sec. 738. Even their failure to report the incidents covered in the direct would have amounted to an "assertion of their non-existence." Wigmore, *op. cit.*, p. 733, Sec. 1042.

(C. A. 2), 145 F. 2d 82, 92.[9] Indeed under the holdings of that court the accused is entitled to inspect any documents in possession of the government which have relevance to the issues being tried, and it is for the trial court to examine the documents and give the accused access to those which are relevant. *United States v. Beekman* (C. A. 2), 155 F. 2d 580, 584; *United States v. Andolschek* (C. A. 2), 142 F. 2d 503, 506.

In sustaining the trial judge the court below held, under *Gordon v. United States,* 344 U. S. 414, that petitioner was not entitled to the reports unless he first showed they were inconsistent with the direct testimony. The Court of Appeals misconceived the holding in the *Gordon* case. There the accused developed on cross-examination that the government's principal witness had given several statements about the criminal transactions in which he did not implicate the defendant. Upon this showing the defendant requested production of the statements. It would appear that the accused's motion was for direct access to the documents. (344 U. S. at 417-418.) This Court held that upon the foundation there laid such production was necessary. Here, on the other hand, there was no showing of contradiction and the accused therefore made a different request. The trial court in this case was asked to require the production of the documents to it so that it could inspect them and give petitioner access only if the contradiction appeared. The *Gordon* opinion

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[9]In a closely similar case it was held, in a carefully reasoned opinion, that, upon a showing that the informer reports to the F.B.I. had been made, the government must deliver them to the court for its inspection and that the court would make available to the accused those reports having value as impeachment. *United States v. Schneiderman* (D.C. Calif.), 106 Fed. Supp. 731.

does not reach this situation. It was not presented there, and this Court explicitly confined its holding to the facts there presented. (344 U. S. at 418.)[10]

(b) Petitioner's Request, at the Hearing, With Reference to the Same Reports.

Nearly every phase of the attack upon Matusow's credibility in recanting was opened during his cross-examination. On redirect, Matusow testified in effect that his contemporaneous reports supported his recantation and belied his trial testimony. From this it would appear that the petitioner had gone as far as possible to lay a foundation that (a) the reports existed, (b) they were consistent with the recantation and contradictory of the trial testimony, (c) they were contemporaneous with the events they record, and (d) they were made long prior to the facts relied on by the government to show corruption or other motive for fabrication.

Petitioner immediately moved that the government be required to produce the reports to the judge for his inspection to determine their relevance. [H. 663, 147.] The judge denied the motion [H. 663], stating that the government is not required "to produce anything from the secret files of the F.B.I." [H. 664.]

Upon the foundation laid, the reports had obvious relevance. Under a decision of this Court they were admissible to rehabilitate Matusow for the foundation showed them to be consistent with his direct testimony and given prior

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[10]The Court of Appeals also relied on *Bowman Dairy Co. v. United States*, 341 U. S. 214; and *Goldman v. United States*, 316 U. S. 129. Those cases deal with pre-trial production of documents, not extra-judicial statements of a witness called by the government. They appear to have no application here.

to the facts showing fabrication or motive to do so. *Ellicott v. Pearl*, 35 U. S. (10 Pet.) 412, 439. This rule of admissibility has found general acceptance. 4 Wigmore, *Evidence*, 3d ed., pp. 203-207, Secs. 1128, 1129. Under the decisions of the Court of Appeals for the Second Circuit the exclusion of such a statement in a civil case is reversible error. *Gelbin v. N. Y., N. H. & H. R. R. Co.* (C. A. 2), 62 F. 2d 500, 502. This kind of evidence is the more valuable when, as here, the rehabilitating declaration is provided by the witness himself, thus permitting cross-examination of the declarant. *Di Carlo v. United States* (C. A. 2), 6 F. 2d 364, 366; *Beaty v. United States* (C. A. 4), 203 F. 2d 652, 656.

The foundation laid having so plainly indicated the relevance and the admissibility of the reports, the least that was called for was that, under the decisions of the Second Circuit cited in subdivision (a), *ante*, the reports be produced to the judge so that he could verify their relevance and turn them over to petitioner. Indeed, upon this Court's holding in *Gordon v. United States*, the reports should have been made available directly to petitioner. In any event, the affirmance by the Court of Appeals of the judge's refusal to order the reports produced under any conditions calls for review by this Court.

There is yet another ground upon which the accepted and usual course of judicial proceedings would hold the reports admissible. We have already reviewed the facts which render them the best evidence of the matters they record. (See also, p. 20, n. 8.) The trial court is vested with a special responsibility to satisfy itself that the recantation is true. For it is under a duty both to see that justice is done to an accused as well as to protect its judgments. *United States v. Johnson*, 327 U. S. 106,

112-113; *Larrison v. United States* (C. A. 7), 24 F. 2d 82, 88; *Martin v. United States* (C. A. 5), 17 F. 2d 973, 976; *Gordon v. United States* (C. A. 6), 178 F. 2d 896, 900. But the court below sanctioned a course of proceeding in which the best evidence of the transactions in question was rendered permanently unavailable. The judge not only refused to accord petitioner access to the documents. He prevented himself from having them in the discharge of his judicial responsibilities. Additionally, this best evidence was in the possession of the government which had the ability to produce it. The judge's ruling that "they are not required . . . to produce anything from the secret files of the F.B.I." [R. 664] was in effect that the reports had no evidential value. He thus prevented himself from drawing an inference against the government and in favor of petitioner from the former's failure to produce stronger evidence within its power to present. Such a failure itself becomes "evidence of the most convincing character." *Interstate Circuit v. United States*, 306 U. S. 208, 225.

For all the reasons here indicated the complete frustration of petitioner's efforts to obtain limited access to the reports in question was a grave deprivation of a fair hearing. Matusow's testimony alone raised the government's case to the nodal point of legal sufficiency. His reference to stopping copper production for the Korean War was inflammatory. It is of the essence of the right to defend that one be permitted reasonable scope in destroying the credibility of the witnesses against him. This is the more compellingly true when, as in the case of Matusow, the witness made a profession of so testifying and his testimony consisted only of uncorroborated oral admissions, by nature the least reliable of evidence.

4 Wigmore, *op. cit.*, section 1056, 7 Wigmore, *op. cit.*, section 2094. At the trial petitioner was denied this opportunity on the very subject matter of the witness' testimony. At the hearing on the motion for new trial, the judge deemed the recantation to be untrue without giving petitioner access to the one item of evidence that might have been determinative of the question. The Court of Appeals regarded it as the product of "the machinations of evil men" [H. 849], presumably including counsel. But both courts reached these results without the benefit of the most reliable searchlight for truth. If petitioner is to be punished for a crime and denounced as a procurer of fabrication, the least that elemental fairness requires is that his judges resort to the most trustworthy avenue to truth afforded by the circumstances. Short of this, there cannot be the requisite certainty that justice has been done.

The supervisory powers of this Court may well be invoked over the difference between the determinations of the lower courts here and that of Judge Dimock with respect to another recantation by Matusow. (*United States v. Flynn* (D. C. N. Y.), 130 F. Supp. 412.) There (almost simultaneously with his recantation here) Matusow recanted his trial testimony in a Smith Act case, and at the hearing on the motion for new trial the government offered the same facts to show fabrication. But there Judge Dimock concluded that the trial testimony was "the lie." (*Idem.*, p. 416.) This, because he examined the F.B.I. reports (essentially similar to the ones sought by petitioner below) together with memoranda of interviews by government lawyers and found a pattern of embellishment in accordance with "Matusow's propensity to lie." (*Idem.*) We are of course not here con-

cerned with whether Matusow lied at the trial or in recanting. But it is more than coincidence that the different conclusion by Judge Dimock followed upon resort to the F.B.I. reports. The failure here to employ this usual and accepted instrument for ascertainment of truth reflects a disturbing inequality in the application of law protecting those accused of crime. The proceedings in this case reflect neither justice nor the appearance of justice, and there is a cloud upon the judgment.

POINT TWO.

The Court of Appeals Erred in Approving the District Court's Charge to the Jury as Well as Its Refusal to Charge on the Issue of Membership.

We have summarized in our Statement of the Case, *ante*, pages 9, 10, the objectionable features of the charge on membership. The Court of Appeals disposed of petitioner's contentions by terming them "unconvincing," adding that a substantially similar charge had been approved in *Hupman v. United States* (C. A. 6), 219 F. 2d 243, cert. den. 349 U. S. 953.

1. *The charge was an abdication by the trial court of its responsibility to guide the jury by appropriate legal criteria.* It failed to give any definition of membership. It laid down no rule or principle of law defining the relationship of member in a voluntary association or prescribing its elements or describing how it is begun or how continued. It ignored this Court's prescript that "In proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial." *American Communications Assn. v. Douds*, 339 U. S. at 410-411. For the instruction nowhere tells the jury that

it must find that petitioner at any time fulfilled the "act of joining."

Failing to furnish a rubric in the form of a principle of law, the trial court gave no guidance in terms of the kind of evidence upon which the conclusion of membership might be predicated. After referring to attendance at Party meetings and holding Party office, the jury was told it "may consider" other "conduct consistent only with membership." But the jury was left to decide for itself what that conduct was. The court did not advise it what conduct was so consistent in the eyes of the law. Any appearance of legal guidance was destroyed by the language "You may consider . . . all other evidence . . . which bears or may bear upon the question of whether or not he was a member. . . .". Having failed to delineate that question the court left it to the jury to select the evidence pertaining to it.

The issue of membership was left wholly at large. To perform its task the jury had to formulate its own legal standards of membership and then apply them to whatever in the evidence the jury thought had a bearing. The words "you may consider" permitted the jury to give effect to any part of the evidence. The jury was not told what evidence, in law, bears on the question of membership. It was not advised what evidence "may bear" on that issue. The charge invited, indeed made possible, only the jury's arbitrary selection. It was as free to base its verdict on petitioner's conversation with Brooks in 1947 or his comments on an alleged Communist newspaper in 1951 as on the asserted admissions to Matusow in July and August, 1950. It could have found membership from Currie's or Peterson's or Eckert's testi-

mony of attendance at "closed Communist meetings"[11] in 1946 and 1947 as well as on Ford's testimony that petitioner held office in the Party in 1949.

Perhaps the most striking illustration of the effect of the charge is its departure from the theory upon which the case was tried. The evidence was presented on the representation that it would show a continuous relationship of membership from April, 1946 "up to and through April 28, 1950." [R. 70.] The trial court received the pre-affidavit evidence on the prosecutor's assurance that he would "follow it" with testimony "right on up to the filing of this instrument." [R. 209.] It was argued to the jury by the prosecutor on the same basis. [R. 1071, 1094, 1100-1101.] Yet under this charge the jury was not told that to find petitioner guilty it was required to find a continuity of membership from April, 1946 to August, 1950, or, indeed, for any shorter period encompassing April 28, 1950.

The Court of Appeals found the evidence to sustain the conviction "overwhelmingly" on the question of membership. Its conclusions rested on what it called "the Government's total proof that appellant was so connected before and after" April 28, 1950. But the jury was not required to find membership only if it found with the government on both the "before" and "after" evidence regarded in its totality. This wholly equivocal charge left it to the jury to find membership on any single item of

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[11]The Court of Appeals in the Ninth Circuit has held such evidence to have no probative value. For to prove the accused is a Communist by his attendance at a meeting to which only Communists are admitted is to resort to circular reasoning. *Bridges v. United States* (C. A. 9), 199 F. 2d 811, 836 (rev'd other grounds, *Bridges v. United States,* 346 U. S. 209).

"before" evidence or "after" evidence without any guidance as to the legal significance of the various kinds of testimony, the chronology of it or its continuity or lack thereof.

It was the judge's "responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria." Upon this "depended" the discharge by the jury of its "responsibility for drawing appropriate conclusions from the testimony." *Bollenbach v. United States,* 326 U. S. 607, 613. The judge provided no yardstick. He in effect told the jury to fashion its own and apply it as it might to the evidence as a whole. Under such circumstances the conviction should be reversed notwithstanding that the Court of Appeals could find what it considered abundant evidence of petitioner's guilt. For petitioner was entitled to the verdict of a jury fairly instructed, not the conclusions of an appellate court as to what could be spelled out of this record. (*Idem.*, p. 614.)

2. *The charge permitted the jury to find membership solely on the basis of the pre-affidavit evidence and was therefore in conflict with this Court's construction of the statute in American Communications Assn. v. Douds,* 339 U. S. 382, 413-414. In that case this Court held that one who had been a member of those groups identified in section 9(h) (22 U. S. C., sec. 159(h)) could sign the affidavit and retain his union position so long as he first severed his connections with the proscribed groups. The Court observed that the purpose of the statute was "to forestall future dangerous acts" which might be committed by the persons described in the statute. Thus it was held that "there is no one who may not, by a voluntary alteration of the loyalties which impel him

to action, become eligible to sign the affidavit." (339 U. S. at 414.) It was for this reason that the Court decided that the statute was not a bill of attainder.

If past membership is not a bar to executing the affidavit and holding union office, past membership, standing alone, cannot constitute proof of false swearing.[12] Otherwise the statute as construed by this Court would be a trap. This Court's gloss upon the statute is a limitation upon the scope of the statute and therefore upon the liability created under it when combined with the false statement statute. (18 U. S. C. 1001.) In criminal cases the accused is entitled to jury instructions which set out correctly the limits of liability created by the statute. This is so even where a reviewing court would take the view that the evidence clearly satisfies those limitations. For the accused must be convicted upon the jury's appraisal of the facts under proper instruction. *United Brotherhood v. United States*, 330 U. S. 395, 409-410.

The vice of the instruction here is that it ignored this limitation. It permitted the jury to return a verdict upon the pre-affidavit evidence alone, indeed, upon any part of the pre-affidavit evidence no matter how remote. The effect of the instruction is best seen in relation to the evidence. As the summary, *ante*, shows the great bulk

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[12]It is necessary to note here that in the *Hupman* case, *supra*, upon which the court below so heavily relied, there was evidence that after signing the affidavit, the accused met with Party officials and accepted from them instructions to conceal his membership. (219 F. 2d at 247.) There is no such evidence here, and the *Hupman* case has no bearing on the issue presented here.

of it was pre-affidavit. The charge invited specific attention to attendance at meetings and holding office. All evidence of this character was pre-affidavit, ranging from April, 1946 to July or August, 1949.[13] There is nothing in the charge which limits in any way the conclusions the jury might draw from the pre-affidavit evidence. It could have convicted petitioner on the Currie testimony of a 1946 meeting or the Eckert and Peterson testimony of meetings in 1947 and 1948.

We do not mean to say that evidence of pre-affidavit membership can never have any probative force in a case of this kind. The question is essentially one of the reasonableness of the inference from the past connection to connection at the time the affidavit was executed. Here are presented question of proximity and degree sufficient to exclude the hypothesis of resignation or other "voluntary alteration of loyalties." But we do not reach this problem for the instruction failed to consider them. It permitted the inference of membership on April 28, 1950 to be drawn from any of the evidence dealing with membership in the period April, 1946 to August, 1949. That error cannot be cured by the appellate court's finding the "total proof" sufficient. Whether the "total proof" satisfied the *Douds* principle is beside the point. The criteria given the jury were contrary to *Douds*.

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[13]Ford testified that "up to September in 1950" petitioner was not "replaced in his position on the State Board." [R. 386-388.] Of course the fact that he was not replaced does not mean that petitioner did not cease to hold the position. The evidence has no probative value at all.

3. *The statute as applied in the instruction on membership approved by the Court of Appeals was rendered so vague, indefinite and uncertain as to afford no ascertainable standard of guilt.* The statute requires a disavowal of membership as of the time the affidavit is executed. In the *Douds* case, *supra,* this Court interpreted the provision to permit former members to sign the affidavit and retain their union positions upon severance of the old connections. The charge permitted any one, or any combination, of many items of evidence tending to show membership as of periods long prior to the affidavit date to support an inference of membership on that date. So construed the statute affords no ascertainable notice of its requirements. Under the charge here past membership in a proscribed group itself became evidence from which membership on the affidavit date may be found. The longer the past membership, apparently, the more strong the inference of membership on the affidavit date. [See, *e.g.,* the opinion below, R. 1210.] Although the *Douds* decision, *supra,* allows for a resignation or other termination of connection, the jury was permitted to find current membership from past without any reference to a possible intervening severance.

The charge impliedly involved a presumption of continuance of the relationship in circumstances where, because of community pressures and the purely voluntary nature of the association, it became wholly unreasonable. *Maggio v. Zeitz,* 333 U. S. 56, 66. Indeed the use of such a presumption in connection with this charge places petitioner under the necessity of proving his innocence in the face of the very facts regarded in *Douds* as blameless in themselves. (Compare Mr. Justice Black, concurring in

Maggio v. Zietz, supra, pp. 80-81.) In such lights the statute becomes a trap for him who is so unwary as to rely on the plain meaning of its terms. It bears a hidden meaning not made manifest until the evidence is closed and the instructions given to the jury. Compare *Connolly v. General Constr. Co.,* 269 U. S. 385; *United States v. Cohen Grocery Co.,* 255 U. S. 81; *Herndon v. Lowry,* 301 U. S. 242.

But this does not exhaust the broad sweep of the charge. It permitted the jury to consider "evidence consistent only with membership" or "all other evidence . . . which bears or may bear upon the question." The evidence included a number of utterances by petitioner entitled to First Amendment protection and having no necessary relationship to membership. Thus his statement to Brooks in 1947 that "he was a Communist and proud of it" [R. 386-388]; or his urging his union members to read a so-called Communist newspaper because it gave the truth about union matters [R. 932]; or his comments upon the Soviet disarmament plan. [R. 592.] Under the quoted language of the charge the jury could have found membership on such evidence. Each of these is plainly a part of free discussion so necessary to the functioning of representative government. *Stromberg v. California,* 283 U. S. 359; *DeJonge v. Oregon,* 299 U. S. 353. The charge permitted the jury to attach criminal consequences to such discussion and to this extent established a standard which no reasonable person could perceive.

POINT THREE.

The Court Below Erred in Approving the District Court's Charge to the Jury on the Issue of Affiliation.

1. *The charge laid down criteria of affiliation in conflict with those defined by this Court in Bridges v. Wixon,* 326 U. S. 135. In a portion of the trial court's language, derived from Webster's Dictionary, the verb "affiliate" is said to mean "to connect or associate oneself with; to adopt, hence usually to bring or receive into close connection; to ally. . . ." [R. 1063.] Such language does not satisfy the test laid down in *Bridges.* Under that decision the closeness of the association or connection must be one "which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith." (326 U. S. at 142.) But more than such a regularized alliance is necessary, for one "who cooperates with such an organization only in its *wholly lawful activities* cannot by that fact be said as a matter of law to be 'affiliated' with it." (326 U. S. at 143.) The cooperation "must evidence a working alliance to bring the proscribed program to fruition." (326 U. S. at 146.) It is this element which is wholly lacking from the charge which the Court of Appeals approved.

The trial court could have included, and the court below should have required, a definition of the proscribed objectives which had to be the object of the affiliation described in section 9(h). In the *Douds* case, *supra,* the constitutionality of the statute was sustained because Congress found that Communist Party objectives included use of trade union leadership to bring about political strikes for revolutionary objectives (339 U. S. at 388),

and it was thought rational to conclude that persons so connected might engage in such conduct. (*Idem.*, p. 392.) It was therefore to this end that the affiliation proscribed in the statute had to be directed. It was concerning affiliation of this kind that the jury should have been instructed.

Lacking this requisite the charge gave to the concept of affiliation the "dubious scope" of which Mr. Justice Frankfurter spoke in the *Douds* case. (339 U. S. at 420.) For it opened the door to consideration by the jury of association for "wholly lawful activities." Significantly these associations are always described in the testimony as "closed communist meetings." If, as the Ninth Circuit held in *Bridges v. United States, supra,* such a description has no probative force to show membership, attendance at such meetings can only show association for the objects mentioned as the subject matter of the meetings. In this case the evidence shows (Statement of the Case, *ante,* pp. 6-10), that the subject matter of the meetings embraced exclusively lawful activities.

There is a striking similarity here with the evidence held in *Bridges v. Wixon, supra,* not to make out affiliation. There this Court rejected as insufficient Bridge's cooperation with "Communist groups for . . . lawful objectives" (326 U. S. at 145); here Jencks through his union and political party worked closely with the Communist Party upon such "wholly lawful activities" as the elimination of discrimination against Mexican-Americans and the defeat of Taft-Hartley. There Bridges advised his members to read "Communist literature" because it more truthfully reported labor news (326 U. S. at 146); here petitioner did the same. [R. 932.]

The existence of such evidence in the record made imperative a charge defining affiliation in accordance with

the standards declared in *Bridges v. Wixon.* Lacking this, section 9(h) would be given so broad a sweep as to embrace ideas, program and utterances protected by the First Amendment. (326 U. S. at 148; compare *Stromberg v. California,* 283 U. S. 359; *Thornhill v. Alabama,* 310 U. S. 88.) So applied the statute would define no ascertainable standard of guilt and operate as a pervasive censorship of trade union activity and expression. *Herndon v. Lowry,* 301 U. S. 242; *Winters v. New York,* 333 U. S. 507; *Thornhill v. Alabama, supra.*

2. *The charge on affiliation was hopelessly confusing and failed to prescribe any lawful standard for the jury.* In another portion of the charge on affiliation the dictionary definition equated "affiliate" with membership—thus, "to unite or attach such a member or branch." [R. 1063.] In the next sentence appears the language, "Affiliation . . . means something less than membership but more than sympathy." In successive sentences the instruction contradicted itself. From this conflict no mind can draw anything but bewilderment. The jury was given no legal guidance for its determination of this key question of the trial.

3. *The charge on affiliation permitted the jury to base its determination solely on pre-affidavit evidence contrary to this Court's decision in American Communications Assn. v. Douds,* 339 U. S. 382. Here the jury was admonished that it could find affiliation "from all the evidence." This left the question as much at large as did the instruction on membership. The jury was free to base its finding on any portion of the pre-affidavit evidence it might select. All that has been said in the preceding point, subdivision 2, applies with equal force here.

POINT FOUR.

The Court of Appeals Erred in Approving the Admission of Evidence of a Separate Offense Not Charged in the Indictment.

Petitioner was accused of filing an affidavit containing false statements and dated April 28, 1950. [R. 2.] A National Labor Relations Board form affidavit signed by petitioner and bearing that date was received in evidence. [G-1, R. 978.] But at the same time and over objection [R. 114, 974-977] there was received a similar affidavit containing the same statements, but dated October 15, 1949. [G-7; R. 977, 989.] Neither at the time of the offer nor at the ruling did the prosecutor make a statement of purpose for the 1949 affidavit. The trial judge made no ruling and issued no admonition to the jury limiting in any way the probative effect of the exhibit. The prosecutor's summations made a number of references to it. [R. 1084, 1087, 1108, 1109, 1112, 1115, 1116.] The trial court's charge to the jury contained nothing pertaining to the exhibit. The pre-affidavit evidence all speaks of a time prior to October 15, 1949. Quantitatively it was far greater than the balance of the government's case.

The Court of Appeals approved the admission of the 1949 affidavit under the exception to the usual rule of exclusion permitting evidence of other crimes to prove motive, intent, absence of mistake or inadvertence, common scheme or plan. That court held that the 1949 affidavit showed abandonment of an earlier policy not to file such affidavits and a general scheme or plan on the part of petitioner to obtain the benefits of Labor Board procedures. [R. 1212.]

1. *The Court of Appeals sanctioned the submission to the jury of inherently confusing and misleading evidence, highly prejudicial in nature, without any instruction to the jury as to its proper evidential use.* This is another instance in which the appellate court appraised the evidence upon a legal basis not provided the jury for its determination. The trial court gave the jury no instructions concerning the probative use of the 1949 affidavit. That exhibit stands in this record without a word of explanation as to what it might properly be considered to prove. If the document was admissible to prove the elements of knowledge and intent recited by the Court of Appeals, it was the obligation of the trial court so to instruct the jury. *Weiss v. United States* (C. A. 5), 122 F. 2d 675, 683; *Tedesco v. United States* (C. A. 9), 118 F. 2d 737, 740. For it is the obli tion of the trial court to instruct the jury on the law applicable to a factual issue submitted for the latter's determination. *Bollenbach v. United States, supra; Todorow v. United States* (C. A. 9), 173 F. 2d 439, 445. This is the more important here when courts generally, including the one below, recognize that such evidence can confuse the jury and lead to a conviction because the accused is regarded as an evil man. *Railton v. United States* (C. A. 5), 127 F. 2d 691, 693; *Kempe v. United States* (C. A. 8), 151 F. 2d 680, 687-689; *Boyer v. United States* (C. A. D. C.), 132 F. 2d 12, 13; *United States v. Modern Reed and Rattan Co.* (C. A. 2), 159 F. 2d 656, 658; *Lovely v. United States* (C. A. 4), 169 F. 2d 386.

2. *The decision of the Court of Appeals in holding the evidence admissible to show knowledge and intent was in conflict with decisions of Courts of Appeals in the Second and Fourth Circuits.* The Court of Appeals held

that the 1949 affidavit was admissible to show that petitioner "knew that it was necessary to file the affidavit in order to obtain those advantages" (from the Labor Board) and that he intended thereby to obtain them. [R. 1213.] The face of the statutes (29 U. S. C., sec. 159(h) and 18 U. S. C., sec. 1001) is persuasive that the only mental state forming part of the crime charged was a deliberate filing of a knowingly false affidavit. But whatever the precise *mens rea,* the 1949 affidavit was not competent to prove it. In prosecutions where the gist of the offense is falsehood evidence of prior utterances of the falsehood is not competent to prove knowledge of the falsity on the occasion charged unless that evidence is accompanied with facts showing knowledge of the falsity in the prior utterance. The mere fact that a statement was twice made does not show that the accused knew it to be false. *Boyer v. United States* (C. A., D. C.), 132 F. 2d 12, 13; *United States v. Rossi* (C. A. 2); 182 F. 2d 292, 293.

Here the necessary accompanying evidence was lacking. The 1950 affidavit [R. 978-979] appears to be in precisely the same form as the 1949 document. [R. 989-990.] Each contains the same signature, and each signature was identified as petitioner's by at least two witnesses. [R. 127, 137.] So far as knowledge of falsity is concerned, the Court of Appeals did not, because it could not, point to any other evidence showing petitioner's knowledge that the 1949 affidavit was false.[14] On the elements of knowl-

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[14]The government argued at the trial and to the Court of Appeals that the statement attributed to petitioner in G-24 [R. 968] that "our union has signed the phony affidavits" was an admission of falsity in the 1949 instrument. By the dictionary (Funk & Wagnalls, 1953; Webster, 1953) "phony" means "counterfeit", "non-genuine", "bogus". The cases recognize a clear distinction between

edge and intent held by the Court of Appeals to be requisite each document furnished precisely the same evidence. For on the reverse side of each appears the identical instruction that each officer of the union must file such an affidavit before the organization "may receive the help of the National Labor Relations Board." [R. 979, 990.] The court below said the 1949 affidavit showed a change of a former union policy in opposition to filing. [R. 1212, 1214.] But it showed on that score nothing different from the 1950 affidavit. Neither could have been filed unless the policy was changed, and it proves nothing relevant to the offense charged to show that the change of policy occurred at one time prior to the filing rather than another.

POINT FIVE.

The Court of Appeals Erred in Approving the Action of the District Court in the Giving and Refusal of Instructions on the Credibility of Informers.

In our Statement of the Case, *ante,* we have shown that the witnesses Ford and Matusow were, during the period and in connection with the incidents covered by their direct testimony, employed by the F.B.I. as informers. We have already referred to Matusow's financial return from this form of spying and serving as an anti-Communist expert. Ford realized substantial returns for his years of service in a more modest capacity. [R. 408.] As to each of them it is appropriate to observe that he

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a non-genuine statement and a false or untrue statement. *United States v. Mulligan* (C. A. 2), 59 F. 2d 200, 201; *Wright v. United States* (C. A. 9), 172 F. 2d 310, 311; *United States v. Smith* (D. C., Ind.), 262 Fed. 191. The Court of Appeals apparently did not accept the government's view of this statement. [R. 1212-1215.]

was "a dangerous instrument" because ". . . the amount of his pay depends on the extent of his employment, and the extent of his employment depends on the discoveries he is able to make." (*Sopwith v. Sopwith*, 4 Sw. & Tr. 243, 247, 147 Eng. Repr. 1509.) Our law recognizes the bias and interest of such persons as well as their low character. *District of Columbia v. Clawans*, 300 U. S. 617, 630-631; *Colyer v. Skeffington* (D. C., Mass.), 265 Fed. 17, 69.

The error in the trial court's instruction was that it told the jury that it "may consider" that these witnesses "received money for services and expenses in furnishing information" to the F.B.I. [R. 1064], but failed to provide a standard by which their considerations were to be guided. For all that appeared the jury could hold this to their credit, not as a limitation on their trustworthiness. Petitioner asked that the jury be charged to "approach their testimony with caution and weigh it with great care." [R. 1117-1118.] Such language would have provided the jury with guidance as to the effect to be given to the facts of employment as an informer.

The court below approved both the instruction given as well as the refusal of the charge proffered. It reasoned that ". . . the Government has nothing to do with selecting the witnesses. The witnesses against appellant were determined when appellant chose those with whom he would fraternize." [R. 1218.] The idea that any person knowingly associates with a police operative whose very function is to conceal his true identity and character ignores reality. A chance meeting with such a person at a vacation resort cannot be regarded as knowing fraternization.

In approving the refusal to give a precautionary instruction of the kind requested here the court below rendered a decision in conflict with those of the Court of Appeals of the District of Columbia. As we apprehend the holdings of that court they require a precautionary instruction where asked for and the informer is not corroborated. *Fletcher v. United States* (C. A., D. C.), 158 F. 2d 321, 322; *Cratty v. United States* (C. A., D. C.), 163 F. 2d 844, 850. See also *Kelly v. United States* (C. A., D. C.), 194 F. 2d 150, 153.

This record satisfies those conditions. Petitioner's request for the charge has already been indicated. Matusow was in no way corroborated within the meaning of these cases. He was the only witness to the incidents who was called. No one testified even to so much as circumstances showing that Matusow had access to petitioner during the period when the conversations took place.

It has already been shown that Matusow was essential to the prosecution and that his credibility was under severe attack. In this context the jury's proper evaluation of his credibility affected the fairness of the trial. At his best Matusow was revealed as a hired informer of the Department of Justice who, once he had emerged as a witness, found ways to convert his purported discoveries into political capital and substantial earnings. Precisely the kind of "dangerous" person described in the *Sopwith* case, *supra*, his unreliability was aggravated by the fact that, having given up his work as a secret operative, his continued earnings and associations with the highly placed depended on his recollection of the past. It would be difficult to imagine a case in which the need for the precautionary instruction would be more pressing.

In the case of Ford the failure to give the charge was also prejudicial. His information was the product of work as a secret operative. He was paid substantially for his services. [R. 408.] His testimony was not corroborated. Next to Matusow, Ford was the most important witness the prosecutor presented. For it was he who said that petitioner had been an officer in the Communist Party in New Mexico and had attended meetings of the Party as late as July or August, 1949. The testimony of all other witnesses who connected Jencks with the Party was far more remote.

It is fair to say that the testimony of Matusow and Ford may alone have turned the scales against petitioner in the jury room. The jury was denied any guidance as to the legal standards by which the trustworthiness of such people is determined.

POINT SIX.

The Court of Appeals Erroneously Affirmed the Action of the District Court in Approving the Systematic and Purposeful Exclusion of Women From the Jury System.

At the outset it should be noted that this point was not discussed or referred to in the opinion of the Court of Appeals. The appellate court's affirmance of the judgment of conviction however necessarily imports its determination of this important question of federal law as yet not decided by this Court.

(a) The Exclusion of Women Violates the Plain Meaning and Purpose of the Governing Statute.

1. The face of the statute discloses a purpose to qualify persons for federal jury service on an individual basis and to exclude no groups of the population. It

provides that "any citizen of the United States" is "competent" to serve who is 21 or over and a resident of the judicial district. These qualifications are obviously on an individual basis—citizenship, age and residence. The exclusions of the next three subdivisions are on similar bases—unpardoned felons, persons illiterate in the English language, those physically or mentally incapacitated. So far there is no disqualification of any group whether defined by sex, race, economic standing, religion or otherwise.

By the final subdivision there are disqualified those who are "incompetent" by the law of the state where the District Court sits. Consistency with the plan to qualify "any citizen" who meets the preceding individual qualifications requires that this exclusion operate also on an individual basis. This is accomplished by giving recognition to state qualifications such as property or interest in the litigation or prior jury service or consanguinity with the litigants. (See, *e.g.*, the subdivisions of Art. 2133, 2134 Texas Civil Stat.) Otherwise state law would rise superior to federal law and cut down the scope of "any citizen." In the case of specific conflict between state and federal statute, as a state law making persons "competent" only when aged 25, surely the federal law would prevail. No less directly would a state statute conflict with section 1861 if it worked a group disqualification.

2. The legislative object disclosed by the history of the section shows a purpose not to effect the exclusion of groups as well as to attain uniformity in the Districts irrespective of state laws. Section 1861 replaces 28 U. S. C. A., section 411 (1946 ed.). This Court has repeatedly held that the purpose of the old enactment was to achieve

a jury "truly representative of the community." *Glasser v. United Staes,* 315 U. S. 60; *Ballard v. United States,* 329 U. S. 187; *Thiel v. Southern Pacific,* 328 U. S. 217. There is nothing in the history of section 1861 indicating an abandonment of that aim. The broad language "any citizen" is a significant departure from the former text in the direction of greater, not less, representativeness.

Moreover, the decided cases under the old statute had held that group exclusions were inconsistent with representativeness. Thus in *Ballard, supra,* the exclusion of women as a group was held destructive of the representative quality required by the statute. In *Thiel, supra,* the exclusion of hourly paid workers brought about the same result. The exclusion of Negroes was held also to destroy representativeness, although the case did not arise under the federal statute. *Smith v. Texas,* 311 U. S. 128. It would require an unmistakably plain manifestation of Congressional intent to find in the new statute a purpose to effect group exclusion.

The new enactment added as a Congressional objective that of uniformity, thus changing the old law under which the qualifications applied in the District Courts reflected the diversity among the states in which the federal courts functioned. The Revisers Notes, carried in the reports of both Congressional Committees (Title 28, United States Code, Congressional Service, 80th Cong., 2d Sess., pp. 1676, 1697, 1880), say of Section 1861 that it "prescribes uniform standards of qualification for jurors" and eliminates qualifications based on state laws, all as recommended by the Judicial Conference. (28 U. S. C. A., following Sec. 1861.) The recommendations of the Judicial Conference had specifically urged the qualifica-

tion of women for federal service "irrespective of state laws." (Report of Judicial Conference of Senior Circuit Judges, 1943, p. 23.) Those recommendations had been reaffirmed by the Conference in 1944 and 1946. (Report of Judicial Conference of Senior Circuit Judges, Oct. 1946; Blume, *Jury Selection Analyzed*, 42 Mich. L. Rev. 831.) At the time the new section was enacted there was no uniformity among the states on the eligibility of women for jury service. Forty states made them eligible on an absolute or limited basis and eight states barred them entirely. (Blume, *op cit.*, p. 853.) Plainly the aim of uniformity embraced specifically the uniform qualification of women in all federal judicial districts. To read subdivision 4 of section 1861 as importing into federal law the group exclusions of the archaic Texas law would frustrate the manifest legislative purpose of uniformity to include uniform qualification of women.

3. The state of the case law at the time the new section was adopted is strongly persuasive of an intent not to permit the exclusion of women by virtue of the operation of a state law. In *Ballard, supra,* this Court said that the exclusion of either sex as such "may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." (329 U. S. at 194.) In *Glasser* it was recognized that representativeness, including representation of women, was part of the concept of fairness and impartiality of the jury, required by the Sixth Amendment. *Glasser v. United States,* 315 U. S. at 84-85. See also *United States*

v. Roemig (D. C., Ia.), 52 F. Supp. 857, 862. Finally, before section 1861 was adopted this Court had warned that neither the federal courts *nor the Congress* could accomplish the exclusion of a group by the simple expedient of incorporating a state law by reference. *Thiel v. Southern Pacific Ry.*, 328 U. S. at 221.

(b) The Exclusion of Women Violates the Fifth and Sixth Amendments.

Representativeness is also a constitutional requirement. Representativeness in *Glasser v. United States*, 315 U. S. at 85 was said to be part of "our notions as to what a proper jury is." And that "notion" is "inextricably intertwined" with the Sixth Amendment's guarantee of an impartial jury. (*Idem.*) While it has never been necessary for this Court to decide the point on constitutional grounds, it seems impossible to conceive of a jury system that would satisfy the requirements of the Sixth Amendment while at the same time systematically excluding one-half the adult population. If the sexes are not "fungible" (*Ballard*, p. 193) the calculated barring of either renders unattainable a truly representative quality. Moreover to submit one accused to an all male jury and another to a jury drawn from men and women equally, solely for reasons of geography, denies equal application of section 1861. To decide the matter on constitutional grounds might well put an end to efforts to frustrate the constitutional objective by the device of statutory manipulation.

Conclusion.

For the reasons advanced herein, the petition should be granted and the writ of certiorari issued.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

29 *United States Code,* section 159(h).

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not, a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022, and 1023 of Title 18 shall be applicable in respect to such affidavits."

18 *United States Code,* section 1001.

"§1001. *Statements or entries generally.*

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the

same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

28 *United States Code,* section 1861.

"§1861. *Qualifications.*

"Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

"(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

"(2) He is unable to read, write, speak and understand the English language.

"(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

"(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held."

Texas Civil Statutes, Article 2133.

"All men over twenty-one years of age are competent jurors, unless disqualified under some provision of this chapter. No man shall be qualified to serve as a juror who does not possess the following qualifications:

"1. He must be a citizen of the State and of the county in which he is to serve, and qualified under the constitution and laws to vote in said county; provided, that his failure to pay poll tax as required by law shall not be held to disqualify him for jury service in any instance.

"2. He must be a freeholder within the State, or a householder within the county.

"3. He must be of sound mind and good moral character.

"4. He must be able to read and write, except in cases provided for in the succeeding article.

"5. He must not have served as a juror for six days during the preceding six months in the district court, or during the preceding three months in the county court.

"6. He must not have been convicted of felony.

"7. He must not be under indictment or other legal accusation of theft or of any felony. Whenever it shall be made to appear to the court that the requisite number of jurors able to read and write cannot be found within the county, the court may dispense with the exception provided for in the fourth subdivision and the court may in like manner dispense with the exception provided for in the fifth subdivision, when the county is so sparsely populated as to make its enforcement seriously inconvenient."

Texas Civil Statutes, Article 2134.

"The following persons shall be disqualified to serve as jurors in any particular case:

"1. Any witness in the case.

"2. Any person interested, directly or indirectly, in the subject matter of the suit.

"3. Any person related by consanguinity or affinity within the third degree to either of the parties to the suit.

"4. Any person who has a bias or prejudice in favor of or against either of the parties.

"5. Any person who has sat as a petit juror in a former trial of the same, or of another case, involving the same questions of fact."

United States Constitution, First Amendment.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Sixth Amendment.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

United States Constitution, Art. I, section 9, clause 3:

"No Bill of Attainder of *ex post facto* Law shall be passed."